United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1022

ORIGINAL

To be argued by
MICHAEL B. POLLACK

B
P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM SANGEMINO,

Defendant-Appellant.

On Appeal From the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Questions Presented	1
Statutes Involved	1
Statement of Facts	5
Argument:	
Point I. Appellant's Grand Jury testimony was improperly admitted into evidence.	11
Point II. The tape recorded conversation of March 20, 1974 should have been suppressed.	19
Point III. The Government failed to fulfill its constitutional obligation under Brady v. Maryland.	26
A. The Richard Falcoff Situation . . .	26
B. The John DiGilio Situation	35
Point IV. The Court improperly denied appellant's motion for a new trial based on newly discovered evidence. . .	37

Contents

Page

Point V. Appellant was denied due process of law due to the ineffective assistance of counsel. 40

Point VI. Appellant is entitled to a new trial under Mesarosh v. United States. . 50

Conclusion 52

TABLE OF CITATIONS

Cases Cited:

Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962) 30

Ashley v. State of Texas, 319 F.2d 80 (5th Cir.), cert. denied, 375 U.S. 931, 84 S.Ct. 331, 11 L. Ed. 2d 263 (1963) . . . 30

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963) 1, 28, 29, 30, 34, 35

Escobedo v. Illinois, 378 U.S. 478, note 14 . . . . . 18, 23

Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967) 29

Grant v. Alleridge, 498 F.2d 376 (2d Cir. 1974) 33

Contents

Page

Massiah v. United States, 377 U.S. 201 (1964) 23, 24

McMann v. Richardson, 397 U.S. 759 (1970) 40

Miranda v. Arizona, 384 U.S. 436 (1964) 18, 19, 21, 23, 24, 25

Mesarosh v. United States, 352 U.S. 1 (1956) 1, 51

Napue v. People of the State of Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 . . . . . 29, 34

Powell v. Alabama, 287 U.S. 45 (1932) . . 40

United States v. Badalamente, 507 F.2d at 15 34

United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967) 30

United States v. Currier, 405 F.2d 1939 (2d Cir. 1969), cert. denied, 395 U.S. 914 (1969) 41

United States v. Deutch, 373 F. Supp. 289 . 34

Contents

Page

United States v. Di Lorenzo, 429 Fed. 216 (2nd Cir. 1970) 22

United States v. Eley, 335 F. Supp. 353 (N.D. Ga. 1972) 33

United States ex rel. Crispin v. Mancusi, 448 F.2d 233 (2nd Cir. 1971) 50

United States ex rel. Marcelin v. Mancuse, 462 F.2d 36 (1972) 42

United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964) 30

United States ex rel. Thompson v. Dye, 221 F.2d 763 (3rd Cir.), cert. denied, 350 U.S. 875, 76 S. Ct. 120, 100 L. Ed. 773 (1955) 30

United States v. Garguilo, 324 F.2d 795 (2d Cir. 1963) 41

United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967) 30, 33

United States v. Hall, 421 Fed. 543 (2nd Cir. 1969) 16, 20

United States v. Kahn, 472 F.2d 272 (2d Cir. 1973) 32, 35

Contents

Page

United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) 32

United States v. Mandujano, 496 Fed. 1050 (5th Cir. 1974) 13

United States v. Marquez, 363 F. Supp. 802 (S.D.N.Y. 1973), aff'd, 490 F.2d 1383 (2d Cir.), cert. denied, 419 U.S. 826 (1974) . 39

United States v. Maxey, 498 F.2d 474 (2d Cir. 1974) 41

United States v. Miller, 411 F.2d 825 (2d Cir. 1969) 32, 33, 36

United States v. Ortega-Alvarez, 506 F.2d 455 (2d Cir, 1974) 41

United States v. Partin, 320 F. Supp. 275 (E.D. La. 1970) 35

United States v. Polisi, 416 F.2d 573 (2d Cir, 1969) 35

United States v. Rosner, 516 F.2d 269 (2d Cir. 1975) 26, 32, 51

United States v. Ruggiero, 472 F.2d 599 (2d Cir. 1973) 31

Contents

Page

United States v. Scully, 225 Fed. 113 (2d Cir. 1955) 14

United States v. Seijo, 514 F.2d 1357 (2nd Cir. 1975) 33

United States v. Sperling, 506 F.2d 1323 (2nd Cir. 1974) 33, 34

United States v. White, 50 F.R.D. 70 (N.D. Ga. 1970), aff'd, 450 F.2d 264 (5th Cir. 1971), cert. denied, 405 U.S. 1072, 22 S. Ct. 1523, 31 L. Ed. 805 (1972) 33

United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974) 41, 49, 50

Statutes Cited:

18 U.S.C. §201 . . . . . 1, 17

18 U.S.C. §371 4

18 U.S.C. §1623 3

28 U.S.C. §1732(a) 31

United States Constitution Cited:

Fifth Amendment 14, 16, 25, 40

Sixth Amendment 16, 24, 40

Contents

Page

Fourteenth Amendment 29

Other Authority Cited:

Kaufman, J., "The Court Needs A Friend," 60 ABA Journal, February 1974 . . . 42, 45

Preliminary Statement

The Appellant-Defendant appeals from a judgment of conviction dated December 29, 1975 filed in the Southern District of New York by the Honorable Charles L. Brieant, Jr. Appellant seeks review in this Court pursuant to the provisions of 28 U.S.C. 1291.

Questions Presented

1. Was appellant's Grand Jury testimony improperly admitted into evidence?

2. Should the tape recorded conversation of March 20, 1974 have been suppressed?

3. Did the Government fail to fulfill its constitutional obligation under Brady v. Maryland?

4. Did the Court improperly deny appellant's motion for a new trial based on newly discovered evidence?

5. Was appellant denied due process of law due to the ineffective assistance of counsel?

6. Is appellant entitled to a new trial under Mesarosh v. United States?

Statutes Involved

18 USC § 201. Bribery of public officials and witnesses

(a) For the purpose of this section:

"public official" means Member of Congress, or Resident Commissioner,

either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official capacity, or in his place of trust or profit.

* * *

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty.

18 USC § 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if:

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a de-

fense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 USC § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Statement of Facts

On April 18, 1975 a jury returned guilty verdicts on each of three counts against the appellant. The three counts charged the appellant with conspiracy to defraud the United States, in violation of 18 USC 371; with having accepted a bribe as a public official of the United States, in violation of 18 USC 201(c); and with having made a material false statement before the Grand Jury, in violation of 18 USC § 1623.

> "At the time relevant here, defendant was on active duty status, assigned to the New York City Headquarters of the Selective Service System, in the capacity of assistant chief of the field division' and later as Manpower and Training Division Chief. (Trial transcript ["Tr."] pp. 813-14). His duties, as described by hir and his superior, included responding to inquiries from Selective Service registrants, the general public and public officials, lecturing to organizations and school groups, and handling relations with dignitaries concerned with Selective Service operations in New York City.

See United States v. Sangemino, 401 F.Supp. 903, 905 (S.D.N.Y. 1975). (543a)

Nathan Lemler was an unindicted co-conspirator and the chief witness for the government in the prosecution. He

testified to running a service, Remedial Education, Inc., aimed at gaining placement for his clients in medical school and as an auxiliary servive "to successfully handle and process all Selective Service problems connected with the candidate for the lifetime of this contract." (582 a) The contract further provided that Lemler would make a full refund of any fees paid if the client were inducted into the Armed Forces, regardless of whether or not the client had been accepted into medical school. Id. at 907, Fn 1.

Appellant testified at trial that during the time Lemler knew the appellant, Lemler held himself out to be a medical doctor (282a) and that he had in fact been convicted of falsely holding himself out to be a Doctor of Education. During the course of his testimony, Lemler claimed to have been successful in 400 out of 401 Selective Service cases, with the help of the appellant. (64a, 72a). Lemler was certain of this number because of records he kept on 3x5 cards, which records he could not account for and which he claimed were either taken by his daughter, Harriet Tollen, or by New York authorities pur-

suant to a search warrant (65a, 107a, 206a, 214a).

In the indictment the government charged 401 Selective Service cases, but in their Bill of Particulars twenty-six (26) names were listed as being those to be mentioned at the trial (24a). Of these twenty-six persons, five were the focus of the government's case. Lemler testified about his efforts to obtain compassionate reassignment to stateside duty for Major Gerald Weiss and a compassionate discharge from the Army for David Zweibel. Lemler testified relating to both the Weiss and Zweibel cases that a fraudulent suicide attempt was staged by a member of the family, whom Lemler arranged to have admitted to the South Oaks Mental Hospital. In each of the above instances Lemler testified the fabricated mental problem was decided upon by Lemler after seeking the advice of the appellant. (87 a). Lemler testified that Major Sangemino was paid for his advisory role in each of these cases. (83a, 89a).

Lieutenant Joseph Petro was, by Lemler's account, his one failure. Lemler tried to stop Petro's overseas

assignment by creating, with the aid of Dr. Teitelbaum, a history of emotional disorders for Lt. Petro's mother. Mr. Petro was also admitted to South Oaks. (100a). When this failed, Lemler made a second attempt. Lemler stated that appellant provided him with a pass to the Pentagon to see a Colonel Nichelson. Lemler's attempts again failed, but this time he learned his failure was brought about by Petro's request for overseas duty. (100a).

Edward Resnick was another of Nathan Lemler's claimed success stories. Lemler claimed Resnick failed his pre-induction physical partly because of a business card of Major Sangemino's given to Resnick, which Resnick was to produce at the Armed Forces Entrance Examination ("AFEE"). Lemler claims to have paid the appellant $1,500.00 for his efforts in behalf of Resnick and $40,000.00 total for all his work. Mrs. Resnick, Edward's mother, denied hiring Lemler to perform any service in connection with Edward's Selective Service status.

> "Lemler testified about his involvment in the case of Richard Falcoff. After consulting with Sangemino, Lemler had Falcoff

> visit a Dr. Wesolowski to arrange for there to be found some physical defect that would entitle Falcoff to a medical deferment. Lemler testified that, at first, they had discussed seeking a medical deferment because of a polynodal cyst, but later it was decided that the grounds would be epilepsy. Falcoff had previously been examined at an AFEE Station in Louisville, Kentucky and had been disqualified with the recommendation that he be recalled in one month. Falcoff was not recalled because it was subsequently determined that his draft lottery number would not be reached during that calendar year. Although Lemler did not testify further regarding the services he or Sangemino provided in the Falcoff case, Lemler stated that he made two payments to Sangemino in connection with this case totaling $1,500.00." (549a)

On March 20, 1974 at 12:00 noon the government issued a subpoena to William Sangemino to appear before a Grand Jury at 2:00 P.M. (329a). When he came to the Grand Jury room at 1:30 P.M. the appellant met Nathan Lemler. (330a). Lemler preceded the appellant into the Grand Jury, and when he left the appellant entered the Grand Jury. After his testimony and as he was exiting the building, appellant was engaged in conversation by Lemler. A tape recording of this conversation was introduced by the government. (123a).

Other witnesses for the government were Charles Mofschowitz, a long time friend of Nathan Lemler, who testified that he delivered an envelope to Major Sangemino on two occasions. (146a). On one of these occasions he testified he saw three $100.00 bills in an envelope before it was sealed. Harriet Tollin, daughter of Nathan Lemler, testified that she accompanied her father to Sangemino's office building on several occasions. Once when he departed, Lemler said to her, "he had to go to the crapper because that was the only place they could have privacy." (213a). Ruth Mears and Joseph Petro also testified that they delivered envelopes, contents unknown, to Major Sangemino from Nathan Lemler. (222a). Both denied knowledge of any wrongdoing on the appellant's part.

Major Sangemino took the stand in his own defense. He testified to knowing Nathan Lemler, having met him when Lemler came to the Selective Service offices to seek advice regarding one of his clients. Sangemino testified that Lemler was asking what course of action Selective Service would follow given a stated set of facts. Such advice was well within the normal course of questions asked

Sangemino by uncountable Selective Service registrants and persons interested in registrants during this period of time. Sangemino denied any wrongdoing on his part and maintained that his job required him to answer questions about the complicated Selective Service laws to any registrant who asked for aid. (287 a).

As the Court noted in denying appellant's motion for a new trial, the defendant presented as witnesses:

> "...his superior, and fellow employees at New York City's Selective Service headquarters and at the Armed Forces Entrance Examiration Stations at Fort Hamilton and Whitehall Streets; draft counselors who had sought guidance from the defendant; members of the staffs of a deceased U.S. Senator and several Congressmen who had made inquiries of the Major regarding the Selective Service or military status of constitutents; and character witnesses who knew the defendant through his employment or socially."

See Sangemino, supra, at 910. (553a).

POINT I

APPELLANT'S GRAND JURY TESTIMONY WAS IMPROPERLY ADMITTED INTO EVIDENCE.

At 12:00 o'clock noon on March 20, 1974 the

appellant was served with a subpoena to appear before a Grand Jury for the Southern District of New York at 2:00 P.M. that same day. (329a). Appellant received the subpoena at his office at 26 Federal Plaza and had to appear in the Foley Square Courthouse, directly across the street from his office. During the next hour and a half the appellant spoke with Thomas Maher, an attorney who had worked with appellant at Selective Service and was at the time an Assistant United States Attorney for the Eastern District of New York, concerning the subpoena. (297a-313a). Appellant asked Maher certain questions regarding the statutory notation on the subpoena, and Maher informed appellant what the different statutes related to. Maher also called a colleague in the Southern District of New York, evidentally on his own initiative, and inquired as to the nature of the proceedings. (306a-307a).

Between 1:30 and 2:00 P.M. Sangemino went to the hallway outside the Grand Jury room to await his call to the Grand Jury. (329a). While there, he met Nathan Lemler, who, despite protestations of friendship, had

been making accusations, charging Sangemino with accepting bribes to aid Lemler's clients in avoiding military service. When asked during the trial what Sangemino did to aid his clients, Lemler stated, "I have no way of knowing, sir; but he rubbed a magic lamp...." (146a). Despite the fact that Lemler had been attempting to sell his story to the prosecutor's office since January, 1974, Lemler did not testify in the Grand Jury on March 20, 1974. (58a, 59a, 122a). Rather, his Grand Jury appearance was marked by perfunctory questions, which ceased when the "cooperating witness" asked for an adjournment to hire an attorney. Lemler was excused by the Grand Jury to appear the following day. He next appeared in the Grand Jury in September, 1974, without an attorney.

Sangemino subsequently entered the Grand Jury room, within two hours of receipt of the subpoena and without an attorney. There can be little doubt that the defendant entered the Grand Jury as a "virtual or putative defendant." See United States v. Mandujano, 496 Fed. 1050, 1052 (5th Cir. 1974). Appellant was informed, "I would

further like to advise you that you are a target of this investigation and there is a substantial likelihood that you will be indicted by it." (61a). Furthermore, the subjective intent of the prosecutor is made crystal clear in his question to Assistant United States Attorney Thomas Maher - "After Sangemino called you, did you call me and tell me that a prospective defendant had called you soliciting advice?" (307a). Mr. Maher answered later in his examination thusly, "...as far as I knew Major Sangemino was not subpoenaed as a defendant but perhaps as a witness...." (313a). Maher's understanding coincides with the appellant's, who testified in the Grand Jury, "I thought I was supposed to come up and be a witness." (61a-62a). In United States v. Scully, 225 Fed. 113 (2nd Cir. 1955), in a decision by Judge Medina, it was held that "the mere possibility that the witness may be later indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury." Scully, supra, at 116. However, immediately prior to its holding in Scully, supra, at 116, the Court comments on the practice of calling an

accused before the Grand Jury as follows: "Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is de jure or de facto an accused." A review of the government's conduct on March 20, 1974 will show no concern for the concept of fair play.

A quick glance at Major Sangemino's testimony reveals a confused and concerned witness who answered questions of his desire to seek professional counsel for the protection of his constitutionally guaranteed rights with questions of the prosecutor concerning necessity.[1/] Under the circumstances of these events, it is manifestly clear that the process had shifted from the investigatory to the accusatory and that Major Sangemino

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1/ EAMINATION BY MR. HARRIS:

Q Would you state your full name?
A Major William Sangemino.
Q Mr. Sangemino, I would like to advise you that you have the Constitutional right to refuse to answer any questions, do you understand that?
A Yes.
Q Anything you say can be used against you in a court of law, you understand that?
A Yes.

was the individual on whom the investigation had focused and the purpose of the prosecutor's interrogation as well as his agent on March 20, 1974 was to elicit a confession from Sangemino, and under those circumstances the accused has an absolute right to consult with an attorney. See United States v. Hall, 421, Fed. 540 (2nd Cir. 1969). The Grand Jury transcript reveals that the appellant was apprised of his constitutional right to counsel in the Grand Jury, and the question is, did he make a knowing and intelligent answer of that right as well as his Fifth Amendment right against self-incrimination in the Grand Jury, U.S. Corst. Amend. V and VI.

As stated in Johnson v. Zerbst, 304 U.S. 458, 465 (1938) "courts indulge every reasonable presumption

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1/ cont'd

Q You have the right to have an attorney present outside the Grand Jury room and to interrupt questioning at any time to speak to that attorney, you understand that?

A Yes.

Q I would like to advise you further, if you cannot afford an attorney, a court appointed attorney would be able to be outside the Grand Jury room and would have the same rights I have just described.

against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right of counsel must depend in each case upon the particular facts surrounding that case, including the background experience, and conduct of the accused." If the defendant gives a statement without the presence of an attorney, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained

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1/ cont'd

A Yes.
Q If you can't afford an attorney the court would appoint one for you, you understand that?
A Yes.
Q I would further like to advise you that this Grand Jury is investigating violations of the Federal law, specifically this afternoon they are investigating violations of Title 18 of the United States Code Section 201 which is bribery involving public officials.

I would further like to advise you that you are a target of this investigation and there is a substantial likelihood that you will be indicted by it.

or appointed counsel." Miranda v. Arizona, 384 U.S. 436, 475 (1964); See also Escobedo v. Illinois, 378 U.S. 478, 490, note 14.

Under the facts of March 20, 1974 the appellant's liberty was significantly restrained by the command that he appear before the Grand Jury at 2:00 P.M. Appellant was the first witness to appear in the Grand Jury and the prosecution's conduct relating to appellant and Nathan Lemler certainly indicates the prosecutor intended to mentally coerce the appellant into making incriminating statements against himself. Miranda, supra, at 448. For all intents and purposes, the appellant was the accused, and the entire thrust of the prosecution's conduct "was to put the defendant in such an

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1/ cont'd

A I understand what you are saying.
Q Do you have an attorney present?
A No, I don't.
Q Would you desire to have an attorney present?
A I don't know. Should I? I'm an Army officer. I could get the Judge Advocate General.
Q Do you desire an opportunity to seek counsel?
A I don't think I need one.
Q You are prepared to answer questions now and waive your rights to counsel?
A Yes.
Q You are a target of this investigation and that means you may be indicted and may be a defendant and may stand trial as a result of this investigation.

emotional state as to impair his capacity for rational judgment. Miranda, supra, at 465. Under the circumstances, the appellant could not have made a voluntary, knowing and intelligent wa: 'er, and therefore his Grand Jury testimony was improperly admitted into evidence against the appellant.

POINT II

THE TAPE RECORDED CONVERSATION OF MARCH 20, 1974 SHOULD HAVE BEEN SUPPRESSED.

In January, 1974 Nathan Lemler began telling his stories to members of the prosecutor's office. At this time, Lemler was awaiting trial in Nassau County, and after a 7 1/2-week trial he was found guilty of twenty counts of grand larceny on March 6, 1974. The fraud for which Lemler was convicted was characterized by the sentencing Judge as convincing the parents of aspiring medical students that for a fee he could attain

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1/ cont'd

A I didn't do anything. I thought I was supposed to come up and be a witness. I didn't do anything that I have to get an attorney for.
Q You are prepared to go ahead at this time?
A Yes.

admission into an accredited medical school by use of under the table payments. (67a, 606a, 607a,622a). Lemler conceded at the trial that he sought help from federal authorities in pressuring the complaining witness to 'acknowledge the work Lemler was doing for them." (129a). Such acknowledgment has not been forthcoming to this day.

Between January, when he began cooperating, and March 20, 1974, Nathan Lemler tape recorded two conversations with the appellant. (46a). As neither of these recordings were offered into evidence, the only fair inference to be drawn is that there was nothing incriminating against the appellant in those conversations. It is obvious that on March 20, 1974 the government was desperate to obtain a confession of guilt or some form of incriminating statement by the appellant which would corroborate the stories being told by Nathan Lemler. U.S. v. Hall, 421 Fed. 543 (2nd Cir. 1969). The government concedes that the tape of March 20 was at the government's behest. (46a). Therefore, Lemler was acting as an agent of the government on March 20. The government

further concedes that Lemler had been promised he would be named as an unindicted co-conspirator and not be indicted well before March 20, 1974. (46a).

Why then was Nathan Lemler read his constitutional rights in the Grand Jury and granted an adjournment to retain an attorney? (58a-59a). Because the Grand Jury was a charade orchestrated by the government to bring Nathan Lemler in contact with William Sangemino under circumstances wherein the government agent would enjoy a psychological advantage over the person from whom he sought to elicit a confession. This psychological coercion was described in Miranda, supra, at 449:

> "The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy -- being alone with the person under interrogation.' The efficacy of this tactic has been explained as follows:
>
> > 'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretaions or criminal behavior within the walls of his home. Moreover

> his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.'"

To obtain this psychological advantage, the prosecutor felt warranted in using the Grand Jury to perpetrate a fraud. This situation can easily be distinguished from the holding in United States v. DiLorenzo, 429 Fed. 216 (2nd Cir. 1970), where the Court denied appellant's claim that a taped conversation with a government agent violated his rights against self-incrimination. There, the appellant brought the co-defendant agent to the offices of the appellant's lawyer for a conversation which the agent recorded. Under the facts, the Court held the interrogation was not custodial nor was there any indication of coercion whatsoever. Here, however, we have the use of a Grand Jury subpoena issued by the government for the obvious purpose of bringing the appellant together with the agent under circumstances aimed at impairing appellant's ability to make a rational judgment, and thereby gain a psychological advantage. The entire scenerio was staged with the understanding that mental coer-

cion can break the will as effectively as physical coercion. See Miranda, supra, at 709.

Assuming arguendo, the Court rejects appellant's first argument and finds an intelligent and knowing waiver by the appellant in the Grand Jury, the question remains - do our Court decisions which guarantee the individual who is the focus of an investigation, or a virtual defendant, the right to counsel when appearing before a grand jury also guarantee the right to counsel when being questioned by an agent of the government in a completely extrajudicial proceeding? As was stated in Massiah v. United States, 377 U.S. 201, 204 (1964), anything less, it was said, might deny a defendant "effective representation by counsel at the only stage when legal aid and advise would help him." It is true that Messiah, supra, deals with a post-indictment situation. In the present case, the appellant had for all practical purposes been charged with bribery, and under these circumstances, "no meaningful distinction can be drawn between interrogation of the accused before and after formal indictment." Escobedo, supra, 486.

In Massiah, supra, 206, the Court held "that the petitioner was denied the basic protection of that guarantee (Sixth Amendment) when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel."

William Sangemino was never advised of his constitutional rights during the course of his interrogation by Nathan Lemler. This interrogation should be viewed as separate and distinct from the Grand Jury interrogation earlier in the day. However, even if viewed as an extension of the earlier interrogation, the appellant was not provided an opportunity to exercise the constitutional rights afforded "to him throughout the interrogation." Miranda, supra, 479. He could not have been because he did not know he was under interrogation at the time. As the Court so appropriately stated in Massiah, supra, 206, "In this case, Massiah was more seriously imposed upon...because he did not even know that he was under interrogation by a government agent."

The interrogation by Nathan Lemler on March 20, 1974 also failed to provide the appellant with his rights under the Fifth Amendment. The use of Nathan Lemler was intended by the government to cause the appellant to lose sight of the constitutional rights of which he was advised earlier:

> "...Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end." (emphasis added)

Miranda, supra, 470. Nathan Lemler was a government agent whose intent it was to elicit incriminating statements from appellant, which was done with total disregard for appellant's rights under the Fifth and Sixth Amendments to the Constitution. It was recently stated that an undercover agent may be part of the prosecution to a sufficient extent that the

prosecution itself can be held responsible for the undercover agent's coercion of witnesses. U.S. v. Rosner, 516 F.2d 269, 279 (2nd Cir. 1975).

POINT III

THE GOVERNMENT FAILED TO FULFILL ITS CONSTITUTIONAL OBLIGATION UNDER BRADY v. MARYLAND.

A. The Richard Falcoff Situation

Richard Falcoff is one of the clients Nathan Lemler testified to having helped avoid military service. (114a). Lemler first mentioned Falcoff as early as April 22, 1974 in a statement to members of the prosecutor's staff (56a). Lemler informed the prosecutor that he met with Falcoff's parents and charged them a $3,500.00 fee and that he subsequently met with Richard Falcoff himself. On June 24, 1974 Richard Falcoff and his father, Norman, testified before the Grand Jury. (488a-540a). Richard Falcoff had been subpoenaed and testified to living in Peoria, Illinois (502a). Norman Falcoff was not subpoenaed and gave no address in the Grand Jury. He merely stated he had recently moved to Florida. (490a). However, during his

testimony, Norman Falcoff provided the Grand Jury with an electroenaphlography report of his son dated May 11, 1959 indicating that Richard had an epileptic condition (491a-541a).

Both Norman Falcoff and Richard Falcoff denied the essential allegations made by Nathan Lemler concerning Richard's Selective Service situation. Both testified Lemler tried, and failed, to gain placement for young Falcoff in a law school, not a Selective Service deferment, as Lemler testified. (114a, 490a). Both witnesses indicated that they believed Richard Falcoff's past history of epilepsy would gain him deferment from the service.(491a). Norman Falcoff's testimony that Lemler made little effort even in helping his son get into law school is consistent with Judge Morrison's findings that Lemler had no ability to get people into medical school. (497a).

Richard Falcoff denied ever meeting Nathan Lemler (508a), contrary to Lemler's testimony (113a), and produced evidence of a history of petit mal epilepsy in contradiction to Lemler's testimony that the illness was contrived by

Lemler and Dr. Wesolewsky as a result of a conversation with the appellant (115a).

In September, 1974 Nathan Lemler appeared in the Grand Jury and shortly thereafter the appellant was indicted. Despite 401 separate instances of bribing the appellant, the government listed 26 persons who were clients of Lemler in its Bill of Particulars (24a) and limited trial testimony to five such persons. Richard Falcoff was among both groups. In September, 1974, when the indictment was returned, the prosecution knew that Nathan Lemler would testify to having bribed the appellant to secure a deferment for Richard Falcoff, and both Richard Falcoff and Norman Falcoff had denied under oath any such involvement with the government's chief witness. The Court placed the evidentiary value of the Falcoff situation in its proper perspective when, during the oral argument of motions on February 14, 1975, it said:

> "...But you see if a person didn't have any reason to expect that he would be called because his file shows a legitimate reason to expect not to be called there is no reason to pay anybody to get out of service." (51a)

Despite all the above and despite the prosecutor's statements that he intended to be liberal in discovery to avoid error, the Falcoff Grand Jury testimony was not turned over at the February 14, 1975 hearing. (49a) On March 26, 1975 the prosecutor transmitted the "3500 and Brady material for the witness Nathan Lemler" to the Court. A carbon copy of that letter was sent to defense counsel "without enclosures." (65a) On April 1, 1975 the government informed defense counsel that all "3500" material will be available to him on April 7, 1975 for the April 8th trial. The letter fails to mention any "Brady" material. (66a) The Falcoff Grand Jury testimony was made available to the defense the day before the trial began:

> "...We recognize that although Brady[1] Giles[2] and Napue[3] and similar decisions have dealt solely with suppression of evidence at trial rather than before trial, the object of the Due Process clause and the Fourteenth Amendment is to assure a fair trial to the accused and that there may be instances where disclosure of exculpatory evidence for the first time during trial would be too late to enable the defendant to use it effectively in his own defense, particularly if it were to open the door to witnesses or documents requiring time to be marshalled and presented."

---

1 Brady v. State of Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)

2 Giles v. State of Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967)

3 Napue v. People of State of Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217

United States v. Cobb, 271 F.Supp. 159, 163 (S.D.N.Y. 1967)

Judge Frankel dealt with a similar issue in United States v. Gleason, 265 F.Supp. 880 (S.D.N.Y. 1967), in which an expansive request for information under the Brady Doctrine was made. The Court noted that an interview of witnesses "known to both sides" there is no requirement of pre-trial disclosure. Gleason, supra, 884 (emplasis added). The Court went on to note:

> "...however, that there should be a blanket rule postponing to the trial all disclosures of the type in question. For example, where the prosecutor knows of witnesses potentially useful to the defense, does not intend to call such witnesses himself, and knows -- or should reasonable be expected to suppose -- that his knowledge is not shared by defense counsel, the information may come too late for effective preparation if it is not delivered until the case is on trial. Cf. United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Ashley v. State of Texas, 319 F.2d 80, 83, 85 (5th Cir.), cert. denied, 375 U.S. 931, 84 S.Ct. 331, 11 L.Ed.2d 263 (1963); United States ex rel. Thompson v. Dye, 221 F.2d 763 (3d Cir.) cert. denied, 350 U.S. 875, 76 S.Ct. 120, 100 L.Ed. 773 (1955); Application of Kapatos, 208 F.Supp. 883 (S.D.N.Y. 1962). Other kinds of instances will undoubtedly arise where the Government 'has in its exclusive possession specific, concrete evidence' of a nature requiring pretrial disclosure to allow for full exploration and exploitation by the defense."

Gleason, supra, 884, 885.

Appellant concedes that he knew the name Richard Falcoff prior to trial and that he himself had been shown an E.E.G. of Falcoff with Falcoff's Selective Service file. However, the E.E.G. was not part of the registrant's Selective Service file and appellant, as a layman, could not know this would forbid its introduction into evidence under the Business Records Act, 28 USC 1732(a). It is obvious from what transpired at trial that the prosecution, when given the E.E.G., merely placed it in the Falcoff file as an administrative procedure to keep track of the document. (117a-120a) In explaining why he showed the test result to appellant, the government relied upon "the Brady theory." (119a). The prosecutor then aggravates his belated disclosure of the Grand Jury testimony by arguing against the admission of the exculpatory document to the prejudice of the appellant (292a-297a, 314a-316a, 318a-327a, 333a-336a, 348a). However, even knowing Falcoff's name, appellant did not know the location of either Richard or Norman Falcoff, nor have any indication that their testimony would be helpful to his defense. See United States v. Ruggiero, 472 F.2d 599 (2nd Cir. 1973).

In denying appellant's post-trial motion for a new trial, the Court restated the applicable tests from United States v. Rosner, 516 F.2d 269, 272 (2nd Cir. 1975):

> "[T]he standards governing a motion for a new trial based on evidence available to the government before trial vary according to the government's conduct relevant to the information. If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, 'a new trial is warranted if the evidence is merely material or favorable to the defense.' United States v. Kahn [supra, 287]. However, when the government's failure to disclose is inadvertent, a new trial is required only if there is 'a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' Id.; United States v. Miller, 411 F.2d 825, 832 (2 Cir. 1969); see United States v. Keogh, 391 F.2d 138, 147-48 (2 Cir. 1968)." (576a)

In denying appellant's motion, the Court reached its decision based on the test set forth in United States v. Miller, supra. We submit that this was error. The high evidentiary value of the type of evidence had earlier been acknowledged by the Court. (51a).

Both Richard and Norman Falcoff emphatically denied that Lemler had ever performed any services in their behalf

towards gaining a Selective Service deferment. In this case, the government called only one of the so-called clients of Lemler to testify at the trial and he denied any knowledge of illegality on his behalf by the appellant. (222a, 223a). The paucity of client witnesses adds greater significance to the Falcoff testimony, which was both "material and favorable to the defense." Rosner, supra. Such testimony was:

> "... without question ' "specific, concrete evidence" of a nature requiring pre-trial disclosure to allow for full exploration and exploitation by the defense.' United States v. Gleason, 265 F.Supp. 880, 885 (S.D.N.Y. 1967) (Frankel, J.). This information, so withheld by the Government, would have had a '"material bearing on defense preparation."' United States v. Eley, 335 F.Supp. 353, 357 (N.D.Ga.1972), quoting United States v. White, 50 F.R.D. 70, 73 (N.D.Ga. 1970), aff'd, 450 F.2d 264 (5 Cir. 1971), cert. denied, 405 U.S. 1072, 22 S.Ct. 1523, 31 L.Ed.2d 805 (1972), and therefore should have been revealed well before the commencement of the trial." Grant v. Alleridge, 498 F.2d 376, 381 (2nd Cir. 1974).

In United States v. Seijo, 514 F.2d 1357, 1364 (2nd Cir. 1975), the Court reversed a conviction because of a witness' denial in his testimony of having been previously convicted of a crime. The Court applied the Miller test, supra, also citing United States v. Sperling, 506 F.2d 1323, 1333

(2nd Cir. 1974), and noted:

> "The taint of Torres' false testimony is not erased because his untruthfulneee affects only his credibility as a witness. 'The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence....' Napue v. Illinois, supra, 360 U.S. at 269, 79 S.Ct. at 1177. It is so here; the jury was squarely faced with the hard question of whom to believe. See United States v. Badalamente, supra, 507 F.2d at 15." Seijo, supra

In appellant's case the jury was denied the opportunity of deciding whom to believe because the government ignored such highly valuable evidence to deny the defense adequate time to find and prepare thos witnesses to testify at his trial. (334a, 336, 337a, 397a). These thoughts were recently stated in United States v. Deutch, 373 F.Supp. 289, 290:

> "...It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is given only at trial, and that the effective implementation of Brady v. Maryland must therefore require earlier production in at least some situations.
>
> "Our Court of Appeals has pointed out that:
>
> 'The importance of Brady. * * * is its holding that the concept out of which

> the constitutional dimension arises in these cases, is prejudice to the defendant measured by the effect of the suppression upon defendant's preparation for trial, rather than its effect upon the jury's verdict.' United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969). See also United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973).

> With this basic understanding it becomes plain 'that evidence in the government's possession favorable to the defendant should be made available to him far enough in advance of trial to allow him sufficient time for its evaluation, preparation, and presentation at trial.'" United States v. Partin, 320 F.Supp. 275, 285 (E.D. La. 1970)

The government's failure to live up to the teachings of Brady relating to the Grand Jury testimony of the Falcoffs demands that appellant's conviction be reversed.

B. The John DiGilio Situation

In September, 1974, the very same month William Sangemino was indicted, Nathan Lemler was incarcerated at the Federal House of Detention in New York City. Upon his entrance into that facility, Lemler met John DeGilio, who at that time was awaiting trial in the District Court for the District of New Jersey. Lemler states that upon hours after their meeting DeGilio requested Lemler tutor him in feigning illness to avoid

standing trial. Lemler further testified on June 6, 1975 that he immediately reported this to the prosecutor in the Sangemino case, who put him in touch with the prosecutor for the District of New Jersey. (614a) The prosecutor for the Southern District of New York states this conversation took place on September 19, 1974 (590a), while the prosecutor for New Jersey indicates said conversation occurred on October 22, 1974. (645a) In either event, the prosecutor knew of such conduct prior to appellant's trial but never informed counsel of the above related facts. Counsel learned of Lemler's relationship after Lemler testified in June of 1975 in New Jersey. (600a-654a) Appellant immediately filed a motion for a new trial. (589a-594a). Oral argument was held on November 10, 1975 (655a-684a) and the Court denied said motion on November 26, 1975. (685a-707a). Appellant subsits that application of the Miller test, supra, to the facts of this situation demands a new trial be granted appellant.

Could skilled counsel armed with this information have developed it sufficiently to have induced a reasonable doubt into the jury box? The key to the prosecutor's case was, in essence, Nathan Lemler. Unless the jury could believe

Lemler, they could not convict the appellant. (687a). Judge Meanor heard Lemler cross-examined for two days and, sitting as the trier of fact, concluded:

> "Lemler, for want of a better description, is a flim-flam man. He's about as trustworthy as a fox in a chickenhouse." [DiGilio transcript of Findings, p. 62.]

Judge Meanor further concluded:

> "I'm afraid for the Government I can attach little or no credibility to Mr. Lemler's testimony. I think Mr. Lemler is prevari cating. He's prevaricating about Mr. DiGilio just as he has prevaricated everything else in this life...." [Id., p. 68] (704a)

Judge Meanor's harsh characterization of Nathan Lemler, supported by the record of the testimony elicited from him at the proceeding in Newark, is living testament to the effective use skilled counsel could have made of the DiGilio situation.

POINT IV

THE COURT IMPROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

Judge Brieant denied appellant's post-trial motion for a new trial (589a), stating:

> "In sum, the Court finds that information regarding Lemler's scheme with DiGilio would not be exculpatory of Sangemino. Its value for the impeachment of Lemler would have been no more than merely cumulative, and it would have been discretionary with the Court whether to admit it even for the limited purpose of impeachment. Rule 608(b), F.R. Evid." (696a)

However, this decision fails to consider the disturbing aspects of Lemler's testimony relative to appellant's trial.

While the government entered into evidence a copy of a contract Nathan Lemler indicated was his standard agreement for medical school placement and secondary agreement relating to Selective Service matters. However, in Newark, Lemler testified to two separate and distinct contracts, one relating solely to the Army. (634a)

At Appellant's trial Lemler stated he was successful in 400 of 401 Selective Service cases. He indicated that all contracts called for medical school placement or deferment from military service. He was sure of the number because of records he kept on 3x5 cards, whose whereabouts he could not explain. (139a, 214a) Yet, in New Jersey, Lemler states, "I have records to indicate that over this four-year period I refunded better than a half a million dollars." (615a)

Lemler further testified in New Jersey that he himself, with his chiropractic degree and three medical books available in the infirmary, tutored DiGilio how to feign illness (601a) If this is true, it is highly probative of the issue - why did Lemler need Sangemino? If Lemler could teach symptoms to DiGilio, he certainly could teach the same symptoms, including petit mal epilepsy, to Selective Service registrants, and therefore frustrate the medical examinations given at the "AFFEE" Station. For what reason then did he need the aid of William Sangemino? If such testimony is false, it would show Lemler to be an "inveterate perjurer" who would go to great lengths to ingratiate himself with the government in return for whatever aid the government would give him in fighting his conviction:

> "The general standard governing motions for a new trial on the ground of newly discovered evidence is that the evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative or impeaching, and of such a character that it would probably produce a different verdict in the event of retrial." United States v. Marquez, 363 F.Supp. 802 (S.D.N.Y. 1973), aff'd. on opinion below 490 F.2d 1383 (2d Cir.), cert. denied 419 U.S. 826 (1974). (702a)

Appellant contends that the newly discovered evidence of perjury committed by Nathan Lemler meets the three-pronged test for a new trial, and such trial should be granted.

POINT V

APPELLANT WAS DENIED DUE PROCESS OF LAW DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court should have granted appellant's motion for a new trial based on the ineffective assistance of counsel at the trial. The Fifth Amendment to the United States Constitution ordains that "no person shall be...deprived of life, liberty, or property, without due process of law." Furthermore, "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. Amendment VI. "It has long been recognized that the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). (emphasis supplied). See also Powell v. Alabama, 287 U.S. 45, 71 (1932).

The current standard of ineffective assistance of counsel in this circuit is that in order to be of constitu-

tional dimensions the representation be so "woefully inadequate as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974), quoting United States v. Currier, 405 F.2d 1939, 1943 (2d Cir. 1969), cert. denied 395 U.S. 914 (1969); see also United States v. Ortega-Alvarez, 506 F.2d 455 (2d Cir. 1974).

Appellant's motion is predicated on the fact of a "total failure to present the cause of the accused in any fundamental respect." United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963). The record in the instant case is replete with instances wherein trial counsel failed to exercise the standard of diligence, preparation and competence expected of a criminal lawyer. Taken individually and collectively, defendant submits that they satisfy the "stringent standards to be met to show inadequacy of counsel," United States v. Maxey, 498 F.2d 474, 483 (2d Cir. 1974), and that his "legal representation [at trial] was constitutionally defective." United States v. Yanishefsky, supra, at 1334.

The quality of trial representation given the accused in our country has come under increasingly sharp

attack from scholars and judges in the past several years. See Kaufman, J. "The Court Needs A Friend," 60 ABA Journal, February 1974. Chief Judge Kaufman, in a strongly worded dissent, recently also rejected the existing standard of review that we must first examine the strength of the government's case before examining the job done by counsel. He stated, "The difficulty I find with the majority view is that it both starts and ends with this consideration...." United States ex rel. Marcelin v. Mancuse, 462 F.2d 36, 47 (1972) (dissenting opinion). Rather, we must look to the quality of representation provided the accused and ascertain if it comports with objective standards of due process.

Appellant's counsel did not act in a competent manner in this trial. He continually did things to the detriment of the appellant and without a clear understanding of the controlling legal principles. The Court comments on counsel's request in front of the jury for the production of the tape recording of a prior consistent statement by a government witness thusly:

> "THE COURT: What you did in the jury's presence really, was bordering on the foolhardy with respect to this tape. I do not understand why anybody would do it." (185a)

Next counsel attempted to offer the Grand Jury testimony of a witness not on the stand as affirmative evidence during the presentation of the government's case. The Court's reaction was one of shock and outrage:

> "MR. BRETTSCHNEIDER: Judge, I would like at this time to offer into testimony --
>
> "THE COURT: You are not in a basis to offer testimony. He is proceeding with his direct. We have not come to the defendant's case. What are you doing to offer if he h not rested?
>
> "MR. BRETTSCHNEIDER: This is the statement, the grand jury minutes of Leonora Resnick.
>
> THE COURT: Absolutely not. When the defendant's case goes forward, you may make an offer at that time.
>
> "MR. HARRIS: I have offered to provide counsel --
>
> "THE COURT: How many years have you been practicing?
>
> "MR. BRETTSCHNEIDER: Many, Judge.
>
> "THE COURT: How many?
>
> "MR. BRETTSCHNEIDER: Over 20.
>
> "THE COURT: You have done criminal t als during that period?
>
> "MR. BRETTSCHNEIDER: That is right, sir.

"If I can state my basis on the record, why we are doing it --

"THE COURT: No. You cannot offer evidence until he finishes with this witness and rests." (186a-187a)

The Court attempted to explain its reaction to this incident in the memorandum denying appellant's post-trial motion by saying: "The Court views this incident as some indication of ineptitude to be considered in evaluating the quality of defense counsel's representation." Sangemino, supra, 912 Fn 5. (587a) However, the shock and outrage expressed at the time cannot be so easily explained away. After the above exchange, counsel again broaches the subject of the individual's Grand Jury testimony and is told to make an effort to subpoena the witness to Court. During this discussion, the prosecutor states that counsel has refused his offer to provide the witness' address (192a-193a), hardly the mark of a diligent advocate.

After much discussion on the admissibility of the Falcoff E.E.G., the Court decides it must sustain the objection which the government has a right to make. (348a) Such decision was reached after it became obvious that it was a

relevant and material document helpful to the defendant's case. In fact, the Court stated, "You shouldn't be arguing about it. You should find a way to agree on it without any possible error or any possible injustice arising out of it." (337a) (emphasis added). Despite the proven value to the defense of this document, defense counsel was not going to object to its exclusion from evidence. Only the Court's intervention preserved the appellant's record. (347a) This brings to mind Judge Kaufman's warning:

> "To put it bluntly, judges cannot compensate for lawyers who do not present their clients' cases as well as wit and effort allow. It is not the judge's task to marshal arguments, find citations, distinguish other apparent precedent, and present the facts -- without the aid and guidance of counsel. The extent we are able to do it all without that help, it will be at the expense of practicing our craft of judging." ABA Journal supra

The Court further, on its own motion, excluded exhibits which had been accepted in evidence on a prior occasion at the trial. In doing so, the Court noted it had not changed its mind, but rather, "No proper objection was made." (346a, 120a-121a). Lastly, on the issue of competence, it should be noted that in a complex trial counsel submitted no requests to change to the Court. (340a)

Counsel's attempt to put forth a defense case was the subject of little planning or preparation. He did not personally review exhibits or actively look for witnesses. (335a, 337a) The effect of the defense case, rather than establishing at the very least a reasonable doubt or at best the defendant's innocence, seemed to have the effect of further proving the prosecution's case. (341a, 343a). Those witnesses who were called were poorly prepared. In fact, what little preparation that did take place usually occurred in the corridor outside the courtroom during a recess. (460a-463a, 465a). Others, such as Gross and Garanfis, sat in the courtroom in violation of the exclusion order until counsel met them in the hallway during a recess. (249a) This method of hallway preparation is never to be recommended to a diligent and conscientious practioner, but in a case involving the intricacies of the Selective Service Law, it was especially devastating. In his affidavit, Aldo L. D'Ambrosi states he was prepared in the hallway, and had more time been spent with him he could have explained Exhibit 4, the business card, and the fact that other members of the Selective Service Staff referred individuals taking their pre-induction physical

examinations to him. (465a) Evelyn Cohen also states she was not properly prepared to testify by defense counsel and that she was unable to state that in her observation the door to Sangemino's office was always open when Lemler was with him. (464a)

Archie Spiegelman, who testified on Major Sangemino's behalf, was also prepared in the hallway. Counsel confirms this on page 615 (Tr.) when he calls the witness, Archie Spielberg. This could have been a key witness if properly prepared because he has previously been qualified as an expert witness in Selective Service matters. Properly prepared and questioned, Spiegelman could have been asked hypothetical questions based on Lemler's testimony to contrast the feasibility of the story. He could also have reviewed the files for indicia of fraud, as indeed he did for the prosecution (462a), which information was never made known to counsel for the defense. In fact, to this day the government has not told appellant which files Spiegelman reviewed. Rather than aiming this witness at the jugular of the prosecution's case, counsel chose to use him to inject some levity into the proceeding. This was done by recounting bizarre incidents which had no relevance to the

charges before the Court. Spiegelman states, "I have testified in at least twenty federal trials and never have I been subjected to such shoddy and haphazard trial preparation by an attorney." (463a)

In addition to not preparing those witnesses he did call to testify, counsel also refused to call several additional witnesses who had competent and relevant testimony to add to the defendant's case.

Eric Palmer offered to testify, but was rejected by counsel because it was felt that further testimony would hurt the case, that the Judge was antagonistic already, and that anything that would further prolong the trial would be detrimental in the long run. Palmer's testimony was relevant to dispel the growing thought in the courtroom that the defendant only helped the powerful and influential because they helped or paid him. Extending himself for this young man could only seriously rebut the prosecutions' theory of the motivation for the defendant's conduct. (454a)

Margaret Sangemino is the defendant's daughter, who asked to testify regarding the allegation her father

solicited airline tickets because that was the only way he could travel. (170a-171a) Her affidavit clearly shows an ability of the defendant to travel at prices he could afford without soliciting tickets from Lemler. (452a)

Lieutenant Colonel William McPhail, Jr. and Lieutenant Colonel Robert C. Wiard, Jr. wished to testify about their specializing in Selective Service problems. Both offered to testify about the defendant's good reputation for truth and veracity. (473a, 476a) Mr. Cohn was not called because he was not given the courtesy of sufficient notice to allow him to clear his schedule of court appearances so that he could testify, and Mr. Oppenheimer was simply never called. Both are respected members of the bar who have had dealings with the defendant on matters involving the influential and the down trodden. Both would testify to his professional behavior and excellent reputation.

Counsel is aware that the selection of witnesses is a matter of trial strategy which appellate courts are reluctant to second guess. United States v. Yanishefsky,

500 F.2d 1327 (2nd Cir. 1974). However, when those who are called are not diligently prepared to testify about facts relevant to the defendant's case, and so many other relevant witnesses are not called at all, it is only the courts who can protect the defendant's right to a fair trial. (250a-252a, 337a). See United States Ex Rel. Crispin v. Mancusi, 448 F.2d 233, 237 (2nd Cir. 1971).

POINT VI

APPELLANT IS ENTITLED TO A NEW TRIAL UNDER MESAROSH V. UNITED STATES.

Nathan Lember has testified in two cases other than the one involving the appellant. In Nassau County he testified in his own behalf in a case in which he took money to gain medical school admissiona and failed to so so. Those who paid him testified and he personally answered their testimony. That case is close in fact to appellant's case because it involves Lemler's allegations that he was able to corrupt an institution in our society. The Court, in sentencing him, termed Lemler a pathological liar.

In New Jersey, Lemler testified for three days concerning again activities relevant to this case. In New

Jersey he claimed he tutored an inmate in medical symptoms in an effort by the inmate to successfully avoid going to trial. The fabrication of medical illness is a situation - closely woven into the allegations made by Lemler against the appellant. Another judge, sitting as trier of fact, discounted Lemler's testimony, finding he has "prevaricated everything else in his life..." (704a) Counsel, in his examination, even asked Lemler if he was "off his rocker." (634a).

Appellant submitted that Nathan Lemler's testimony in Newark and in Nassau County is so bizzare that it raises the inference that he is either an inveterate perjurer or a disordered mind. Rosner, supra, 279. His mental situation is discernable to all who come in contact with him, and if the precedent of Mesarosh v. United States, 352 U.S. 1 (1956) is to have any meaning, then it must be applied to the testimony given by Nathan Lemler. Such application mandates that appellant's conviction be reversed and he be granted a new trial.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the conviction of the appellant in the Court below should be reversed.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff- Appellee,

- against -

WILLIAM SANGEMINO,
Defendant- Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 West 146th Street, New York, New York

That on the **22th** *day of* **March** *1976 at* **One St. Andrews Plaza, New York, New York**

deponent served the annexed **Appendix Brief** *upon* **Robert J. Fiske Jr., US Attorney for the Southern District** *the* **Attorney** *in this action by delivering* ~~a~~ 2 *true copy* 5 *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this **22th** *day of* **March** *19* 76

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977